NAUNG FELIX SITOM

v.

PP

HIGH COURT SABAH & SARAWAK, TAWAU
RICHARD MALANJUM J
[CRIMINAL APPEAL NO: T(42) 32 OF 1998]
21 APRIL 1999

CRIMINAL LAW: *Sabah Forests Enactment 1968 - Section 30(1)(g) - Possession of logs without lawful authority - Whether logs obtained from alienated land - Whether appellant had native customary right or tenure*

The appellant appealed against his conviction and sentence on a charge under s. 30(1)(g) of the Sabah Forests Enactment 1968 ('the Enactment'). The appellant was found guilty of having in his possession 24 pieces of logs of wood for which no royalty was paid.

The appellant claimed that he felled the trees for the construction of his house and that the land wherein he felled the trees was an alienated land ('the land'). It was alleged that his father applied for the land and obtained approval and that since 1978 his father cultivated the land. The appellant also claimed that he had native customary right or tenure.

The respondent argued that as no title deed was issued to the appellant, the land was not an alienated land. Further, the claim of native customary right or tenure did not entitle the respondent to have a title to the land but only to establish a claim.

Held:

[1] An alienated land as defined in the Enactment is not limited to land having a title deed issued. A person having native customary tenure as defined in the Sabah Land Ordinance should be accorded the same status as one that is in possession of a title deed. Section 67 (2) of the Sabah Land Ordinance only gives the Collector a discretion to require a native holding land under native customary tenure to acquire a title deed. As such, there was no reason why the land should not be an alienated land within s. 2 of the Enactment.

[2] As there was no dispute on the source of the logs found in the possession of the appellant, it could be concluded that the logs came from an alienated land. It followed that the proviso to the definition of 'forest produce' in s. 2 applied, ie, in the case of alienated land the definition

of forest produce only applied to the produce of natural uncultivated trees or plants. The appellant claimed that the trees he felled were not natural uncultivated trees and there was no challenge to this assertion.

[3] In the event the foregoing conclusion was wrong, s. 41 of the Enactment was applicable. A native has the right to cut and remove forest produce for the construction of a dwelling-house for the abode of himself and his family.

[Conviction and sentence set aside.]

Legislation referred to:
Sabah Forests Enactment 1968, ss. 2, 4, 15, 30(1)(g), (2)(b), 37(3), 41, 65, 66, 67(2), 88

For the appellant - Norbert Chin; M/s Norbert Chin & Co
For the respondent - Amir Nassaruddin, DPP

Reported by Sherin Kunhibava

JUDGMENT

Richard Malanjum J:

This is an appeal by the appellant against his conviction and sentence on a charge under s. 30(1)(g) of the Sabah Forests Enactment 1968 (the Enactment) and punishable under s. 30(2)(b) thereof. He was found guilty and sentenced to a fine of RM3,000 in default two months imprisonment. The logs found in his possession as well as the vehicle used in the commission of the offence were also forfeited pursuant to s. 37(3) of the Enactment.

Briefly it was the prosecution case that on 19 November 1997 at about 7.40pm a group of personnel from the forestry department saw a lorry model Isuzu and bearing registration number SA 7871N around Kilometer 7, Jalan Tungku/ Lahad Datu. At that time the lorry had a tyre punctured and was thus being replaced. The personnel carried out inspection and they discovered that the lorry was carrying 24 pieces of log. The logs were covered with canvas. As there was no proper document from the forestry department produced for the transportation of those logs the lorry together with its driver were taken to the forestry office for further investigation. A police report was also subsequently lodged on the matter. The result of the investigation by the forestry department was that no royalty was paid for those logs. As such the appellant was indicted for the offence as per charge.

Basically the defence of the appellant was that he went into the land (the said land) which was applied by his father since 1977/78 to get some wood as beams for the construction of his house. According to him the trees in the

said land were not the original trees as the area had been cleared before. He also said that he is a native of Kadazan/Dusun/Iban race.

The appellant called his father (DW2) as his witness. In his evidence DW2 said that he applied for the said land. His application has been approved. And since 1978 he has been cultivating the said land planting various crops such as cocoa, oil palm seedlings and fruit trees. However he conceded that so far no title deed has been issued to him. He nevertheless produced a letter from the Jabatan Tanah dan Ukur dated 12 November 1980 (exh. D1) authorising the survey of the said land. In fact there were two applicants, DW2 and another with the total area of 30 acres.

There was also *locus in quo* carried out by the learned Sessions Court judge. It is not in dispute that cocoa trees are found planted in the said land.

In finding the appellant guilty of the charge the learned Sessions Court judge (SCJ) found that the appellant admitted felling the trees and loading them onto the lorry to be taken home. As such she concluded that possession and knowledge were shown. She also found that no royalty had been paid for those logs. And the learned SCJ did not accept the assertion of the appellant on the said land being an alienated land. She found no evidence to that effect. Thus her conclusion was that the prosecution had proved its case beyond reasonable doubt. The appellant was therefore convicted.

The appellant submitted in all eight grounds in this appeal. However they can be summarised as:

(1) that the said land was already an alienated land at the material time and

(2) that the said land has already been under native customary tenure.

As such the exception within the meaning of 'forest produce' in s. 2 of the Enactment comes into play.

For the respondent learned Deputy Public Prosecutor argued that the said land could not be described as an alienated land since it has no title deed issued as required by law. And to the claim of native customary right or tenure the learned deputy contended that it did not entitle a title but only to establish a claim.

At first blush this case appears to be founded on a simple question of whether or not the said land was indeed already an alienated land at that time. And that seems to be the approach adopted by the learned SCJ. However on further perusal of the relevant laws, in particular the Sabah Land Ordinance and the Enactment, I am of the view that there is a wider implication to whatever the decision that may be made in this case. There are questions of the scope

of native rights and native customary tenure in relation to the taking of forest produce under the Enactment.

I will start by referring to the relevant provisions of the Enactment.

Section 2 on the definitions of an 'alienated land' and 'forest produce' read:

> "alienated lands" means any land in respect of which a registered title for the time being subsists under any written law relating to land title registration, land tenure or mining, or **which has become in any manner vested in any person or authority other than the State**; (emphasis added).
>
> "forest produce" means -
>
> (a) the following when found in or brought from a Forest Reserve, State land or alienated land - timber, firewood, charcoal, getah, wood oil, bark, extracts of bark, copal, damar and atap:
>
> **Provided that in the case of alienated land this paragraph shall only apply to the produce of natural uncultivated trees or plants;** (emphasis added).

And s. 30(1)(g) provides:

> 30. General offences.
>
> (1) Any person who, without lawful authority or legal right -
>
> ...
>
> ...
>
> (g) keeps or has in his possession, custody or control any forest produce which bears any property mark or in respect of which a forest offence has been committed or upon which the royalty or other payment due in respect thereof has not been paid or made;
>
> ...
>
> ...
>
> shall be guilty of an offence.

The penalty under sub-s. (2) reads:

> (2) Any person guilty of an offence under subsection (1) shall on conviction be liable -
>
> (a) ...
>
> ...
>
> (b) if the offence is under paragraph (g) of subsection (1), to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding five years or to both such fine and imprisonment;

There is another section that neither party referred to. And that is s. 41 which reads:

41. **Saving of native rights.**

Subject to any provisions of the rules prohibiting or regulating the cutting or removal of any specified form of forest produce or prohibiting or regulating the cutting or removal of all or any forest produce in any specified locality, *nothing in this Enactment shall be deemed to prohibit the cutting and removal from State land which is not for the time being in the lawful occupation of some person or, with the permission of the owner thereof, from alienated land, by any native of any timber, atap or other forest produce which may be necessary* -

(a) **for the construction or repair of a dwelling-house for the abode of himself and his family; (emphasis added).**

(b) for the construction of fences and temporary huts on any land lawfully occupied by him;

(c) for the construction or repair of native boats;

(d) for the upkeep of his fishing stakes and landing places;

(e) for fire-wood to be consumed for his domestic purposes; or

(f) for the construction and upkeep of clinics, schools, community halls, places of worship, bridges and any work for the common benefit of the native in-habitants of his kampung.

As for the Sabah Land Ordinance the pertinent sections with emphasis added are as follows:

Section 4 on the definition of 'alienate' it states:

"alienate" means to lease, or otherwise dispose of State land on behalf of the Government in consideration of the payment of such rent and of such premium, if any, as may be required;

On native customary rights s. 15 provides:

Native customary rights shall be held to be -

(a) **land possessed by customary tenure;**

(b) land planted with fruit trees, when the number of fruit trees amounts to fifty and upwards to each hectare;

(c) isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the Collector were planted or unkept and regularly enjoyed by him as his personal property;

(d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;

(e) land that has been cultivated or built on within three years;

(f) burial grounds or shrines;

(g) usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.

And ss. 65 and 66 read:

65. **"Customary tenure" means the lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years** or by title under this Part or under the Poll Tax Ordinance*, or Part IV of the Land Ordinance, 1913.

* Poll Tax Ordinance was repealed by Ordinance No. 14 of 1962.

66. **Customary tenure shall confer upon the holder thereunder a permanent heritable and transferable right of use and occupancy in his land** subject only, in addition to the general provisions of Part I of this Ordinance to -

(a) the duty of preparing his padi fields and planting padi, cleaning, working and cultivating his garden, orchards or sago lands in such manner as may be prescribed;

(b) the liability to give his labour free, when required by the Collector or Native Chief or Headman, for the performance of such works and duties for the common benefit of himself and neighbouring land holders as may be prescribed.

Whereas s. 67(2) provides:

67. (1) ...

(1) Any native who holds his land under customary tenure without documentary title **may be required** by order of the Collector in writing to take out title by entry in the Native Title Register and to pay the prescribed fees for such title.

And finally s. 88 reads:

88. No new title and no dealing with, claim to or interest in any land **except land still held under native customary tenure without documentary title** shall be valid until it has been registered in accordance with the provision of this Part.

On careful perusal of the sections quoted above it is my considered opinion that an alienated land as defined in the Enactment is not limited to land having

a title deed issued. Section 2 of the Enactment provides the answer. And that being the case a person having native customary tenure as defined in the Sabah Land Ordinance should be accorded the same status as one that is in possession of a title deed. In fact s. 67(2) of the Sabah Land Ordinance that was relied upon by the learned Deputy only gives the collector discretion to require a native holding land under native customary tenure to acquire a title deed. As such in the instant case there is no reason why the said land in question should not be described as an alienated land within the context of the definition as found in s. 2 of the Enactment.

Accordingly, as there was no dispute on the source of the logs found in the possession of the Appellant it could be concluded that the logs came from an alienated land. It follows that the proviso to the definition of 'forest produce' should apply. After all there was also no challenge to the assertion of the Appellant that the trees he felled were not the natural uncultivated trees. On this ground therefore that this appeal should be allowed with the conviction and sentence set aside.

In the event that I am wrong in the foregoing conclusion, I am also of the view that s. 41 of the Enactment should apply. I am aware that such a point was not canvassed. But in the interest of justice I should take it into account in the instant case. As such in the exercise of my revisionary power I should revise this case in that the conviction and sentence should be set aside. There was no dispute on the assertion of the appellant that he fell and the trees intending to use them as materials for the construction of his house. And although the charge was for non-payment of royalty, such an issue should not arise in the first place if s. 41 is applicable. The appellant was caught while transporting the logs and hence that is removal permissible under the said section.

The conviction and sentence of the appellant are set aside for the reasons hereinabove. Any fine paid should be refunded and the order forfeiture of the lorry and the logs is hereby set aside as well.